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RECENT AMERICAN CASES.

In the Supreme Court of the United States, January, 1853.

GEORGE RUNDLE AND WILLIAM GRIFFITHS, TRUSTEES OF THE ESTATE OF JOHN SAVAGE, DECEASED, PLAINTIFFS IN ERROR, *vs.* THE DELAWARE AND RARITAN CANAL COMPANY, DEFENDANT IN ERROR.

1. By the law of Pennsylvania, the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public.
2. Riparian owners in that State have no title to the river, or any right to divert its waters unless by license from the States.
3. That such license is revocable, and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly or by a corporation created for that purpose.
4. The proviso to the provincial acts of Pennsylvania and New Jersey of 1771, does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license or toleration of his dam.
5. As by the laws of his own State the plaintiff who claimed under Hoops, could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.
6. The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who own the river as tenants in common, are not in a condition to question the relative rights of either to use its waters without consent of the other.
7. This case is not intended to decide whether a first licensee for private emolument can support an action against a later licensee of either sovereign or both, who, for private purposes, diverts the water to the injury of the first.

This was a writ of error to the Circuit Court of the United States, for the District of New Jersey. The opinion of the Court was delivered by

GRIER, J.—The plaintiffs in error, who were plaintiffs below, are owners of certain mills in Pennsylvania, opposite to the City of Trenton, in New Jersey. These mills are supplied with water from the Delaware River by means of a dam, extending from the Penn-

sylvania shore to an island lying near and parallel to it, and extending along the rapids to the head of tide water.

The plaintiffs, in their declaration, show title to the property under one Adam Hoops, who had erected his mill, and built a dam in the river, previous to the year 1771. In that year, the provinces of Pennsylvania and New Jersey respectively passed acts declaring the river Delaware a common highway, for purposes of navigation up and down the same, and mutually appointing commissioners to improve the navigation thereof, with full power and authority to remove any obstructions whatsoever, natural or artificial, and subjecting to fine and imprisonment any person, who should set up, repair, or maintain any dam or obstruction in the same. *Provided*, "That nothing herein contained shall give any power or authority to the commissioners herein appointed, or any of them, to remove, throw down, lower, impair, or in any manner to alter, a mill dam erected by Adam Hoops, Esq., in the said river Delaware, between his plantation and an island in the said river, nearly opposite to Trenton; or any mill dam erected by any other person, or persons, in the said river, before the passing of this act, nor to obstruct, or in any manner to hinder, the said Adam Hoops, or such other person or persons, his or their heirs and assigns, from maintaining, *raising*, or repairing the said dams respectively, or from taking water out of the said river, for the use of the said mills and waterworks erected as aforesaid, and *none other*."

The declaration avers that, by these acts of the provincial legislatures, the said Hoops, his heirs and assigns, became entitled to the free and uninterrupted enjoyment and privilege of the river Delaware, for the use of the said mills, &c., without diminution or alteration by or from the act of said provinces, now States of Pennsylvania and New Jersey, or any person or persons claiming under them, or either of them. Nevertheless, that the defendants erected a dam in said river above plaintiffs' mills, and dug a canal, and diverted the water to the great injury, &c.

The defendants are a corporation chartered by New Jersey, for the purpose of "constructing a canal from the waters of the Delaware to those of the Raritan, and of improving the navigation of

said rivers." They admit the construction of the canal, and the diversion of the waters of the river for that purpose, but demur to the declaration, and set forth as causes of demurrer :

"That the act of the legislature of the then Province of Pennsylvania, passed March ninth, in the year of our Lord one thousand seven hundred and seventy one, and the act of the then Province of New Jersey, passed December twenty-first, in the year of our Lord one thousand seven hundred and seventy-one, as set forth in said amended fifth count, do not vest in the said Adam Hoops, or in his heirs or assigns, the right and privilege to the use of the water of the river Delaware, without diminution or alteration by or from the act of the then Province, now State of Pennsylvania, or of the then Province, now State of New Jersey, or of any person or persons claiming under either of them, or of any person or persons whomsoever, as averred in the said amended fifth count of the said declaration. And also for that it does not appear, from the said amended fifth count, that the same George Rundle and William Griffiths, are entitled to the right and privilege to the use of the water of the river Delaware, in manner and form as they have averred, in the said amended fifth count of their declaration.

"And also that as it appears, from the said amended fifth count, that the river Delaware is a common highway and public navigable river, over which the States of Pennsylvania and New Jersey have concurrent jurisdiction, and a boundary of said States, these defendants insist that the legislative acts of the then Provinces of Pennsylvania and New Jersey, passed in the year of our Lord seventeen hundred and seventy-one, as set forth in the said amended fifth count, were intended to declare the said river Delaware a common highway, and for improving the navigation thereof, and that the provision therein contained, as to the mill dam erected by Adam Hoops, in the said river Delaware, did not, and does not amount to a grant or conveyance of water power to the said Adam Hoops, his heirs or assigns, or to a surrender of the public right in the waters of the said river, but to a permission only to obstruct the waters of the said river by the said dam, without being subjected to the penalties of nuisance; that the right of the said Adam Hoops

was, and that of his assigns is, subordinate to the public right, at the pleasure of the legislature of Pennsylvania and New Jersey, or either of them.”

On this demurrer, the Court below gave judgment for the defendants, which is now alleged as error.

It is evident that the extent of the plaintiffs’ rights as a riparian owner, and the question whether this proviso operates as the grant of a usufruct of the waters of the river, or only as a license or toleration of a nuisance, liable to revocation, or subordinate to the paramount public right, must depend on the laws and customs of Pennsylvania, as expounded by her own Courts. It will be proper, therefore, to give a brief sketch of the public history of the river, and the legislative action connected with it, as also of the principles of law affecting aquatic rights, as developed and established by the Courts of that State.

The river Delaware is the well known boundary between the States of Pennsylvania and New Jersey. Below tide water, the river, its soil and islands, formerly belonged to the Crown; above tide water, it was vested in the proprietaries of the co-terminous provinces, each holding *ad medium filum aquæ*. Since the Revolution the States have succeeded to the public rights, both of the Crown and the Proprietaries. Immediately after the Revolution, these States entered into the compact of 1783, declaring the Delaware a common highway for the use of both, and ascertaining their respective jurisdiction over the same. For thirty years after this compact, they appear to have enjoyed their common property without dispute or collision. When the legislature of either State passed an act affecting it, they requested and obtained the concurrence and consent of the other. Their first dispute was caused by an act of New Jersey, passed February 4, 1815, authorizing Coxe and others to erect a wing dam, and divert the water for the purpose of mills and other machinery. The consent of the State of Pennsylvania was not requested; it therefore called forth a protest from the legislature of that State. This was followed by further remonstrance in the following year. A proposition was made to submit the question of their respective rights to the Supreme Court of the

United States, which was rejected by New Jersey. After numerous messages and remonstrances between the Governors and legislatures, commissioners were mutually appointed to compromise the disputes, but they failed to bring the matter to an amicable conclusion. The dispute was never settled, and the wing dam remained in the river.

In 1824, New Jersey passed the first act for the incorporation of the Delaware and Raritan Canal Company, for which the Company gave a bonus of \$100,000. This act requires the consent of the State of Pennsylvania; and, on application being made to her legislature, she clogged her consent into so many conditions, that New Jersey refused to accept her terms, returned the bonus to the Company, and so the matter ended for that time.

Both parties then appointed commissioners, to effect, if possible, some compact, or arrangement, by which each State should be authorized to divert so much water, as would be necessary for these contemplated canals. After protracted negotiations, these commissioners finally (in 1834) agreed upon terms, but the compact proposed by them was never ratified by either party.

In the meantime, each State appropriated to itself as much of the waters of the river as suited its purpose. In 1827 and 1828, Pennsylvania diverted the river Lehigh, a confluent of the river Delaware, and afterwards, finding that stream insufficient, took additional feeders for her canal out of the main stream of the Delaware. On the 4th February, 1830, the legislature of New Jersey passed the act under which the defendants are incorporated, and in pursuance of which they have constructed the dam and feeder, the subject of the present suit.

The canals in both States, supplied by the river, are intimately and extensively connected with their trade, revenues, and general property, while the navigation of the river above tide water, and the rapids at Trenton, is of comparatively trifling importance, being used, only at times of the spring freshets, for floating timber down the stream, when the artificial diversions do not affect the navigation. The practical benefits resulting to both parties, from their great public improvements, appear to have convinced them that

further negotiations, complaints, or remonstrances would be useless and unreasonable, and thus, by mutual acquiescence and tacit consent, the necessity of a more formal compact has been superseded.

The law of Pennsylvania, by which the title and rights of the plaintiffs must be tested, differs materially from that of England, and most of the other States of the Union. As regards her large fresh water rivers, she has adopted the principles of the civil law. In the case of *Carson vs. Blazer*, the Supreme Court of that State decided that the large rivers, such as the Susquehanna and Delaware, were never deemed subject to the doctrines of the common law of England, and applicable to fresh water streams, but that they are to be treated as navigable rivers; that the grants of William Penn, the proprietary, never extended beyond the margin of the river, which belonged to the public, and that the riparian owners have, therefore, no exclusive rights to the soil or water of such rivers *ad filum medium aquæ*.

In *Shrunk vs. The Schuylkill Navigation Company*, the same Court repeated the same doctrine, and Chief Justice Tilghman, in delivering the opinion of the Court, observes, "Care seems to have been taken, from the beginning, to preserve the waters of these rivers for public uses, both of fishery and navigation; and the wisdom of that policy is now more striking than ever, from the great improvements in navigation, and others in contemplation, to effect which it is necessary to obstruct the flow of the water in some places, and in others to divert its course. It is true that the State would have had a right to do these things for the public benefit, even if the rivers had been private property; but then compensation must have been made to the owners, the amount of which might have been so enormous, as to have frustrated, or at least checked, these noble undertakings."

In the case of *The Monongahela Navigation Company vs. Coons*, the defendant had erected his mill under a license, given by an act of the Legislature (in 1803) to riparian owners, to erect dams of a particular structure, "provided they did not impede the navigation," &c. The Monongahela Navigation Company, in pursuance of a charter granted them by the State, had erected a dam in the Mo-

nongahela, which flowed back the water on the plaintiff's mill, in the Youghogany, and greatly injured it. And it was adjudged by the Court, that the Company were not liable for the consequential injury thus inflicted. The Court, speaking of the rights of plaintiff consequent on the license granted by the act (of 1803), observed, "That statute gave riparian owners liberty to erect dams of a particular structure, on navigable streams, without being indictable for a nuisance; and their exercise of it was, consequently, to be attended with expense and labor. But was this liberty to be perpetual, and for ever tie up the power of the State? Or is not the contrary to be inferred from the nature of the license? So far was the Legislature from seeming to abate one jot of the State's control, that it barely agreed not to prefer an indictment for a nuisance, except on the report of viewers to the Quarter Sessions. But the remission of a penalty is not a charter, and the alleged grant was nothing more than a mitigation of the penal law."

The case of *The Susquehanna Canal Company vs. Wright* confirms the preceding views, and decides "that the State is never presumed to have parted with one of its franchises, in the absence of conclusive proof of such an intention. Hence a license, accorded by a public law to a riparian owner, to erect a dam on the Susquehanna River, and conduct the water upon his land for his own private purposes, is subject to any future provision which the State may make with regard to the navigation of the river. And if the State authorize a company to construct a canal, which impairs the rights of such riparian owner, he is not entitled to recover damages from the company. In that case Wright had erected valuable mills, under a license granted to him by the legislature; but the Court says, "He was bound to know that the State had power to revoke its license, whenever the paramount interests of the public should require it. And, in this respect, a grant by a public agent of limited powers, and bound not to throw away the interests confided to it, is different from a grant by an individual, who is master of the subject. To revoke the latter, after an expenditure in the prosecution of it, would be a fraud. But he who accepts a license from the legislature, knowing that he is dealing with an agent,

bound by duty not to impair public rights, does so at his risk; and a voluntary expenditure on the foot of it gives him no claim to compensation."

The principles asserted and established by these cases are, perhaps, somewhat peculiar; but, as they affect rights to real property in the State of Pennsylvania, they must be treated as binding precedents in this Court. It is clear, also, from the application of these principles to the construction of the proviso under consideration, that it cannot be construed as a grant of the waters of a public river for private use, or a fee simple estate in the usufruct of them, "without diminution or alteration." It contains no direct words of grant, which would operate by way of estoppel upon the grantor. The dam of Adam Hoops was a nuisance when it was made, but as it did little injury to the navigation, the commissioners, who were commanded to prostrate other nuisances, were enjoined to tolerate this. The mills of Hoops had not been erected on the faith of a legislative license, as in the cases we have quoted, and a total revocation of it would not be chargeable with the apparent hardship and injustice, which might be imputed to it in those cases. His dam continues to be tolerated, and the license of diverting the water to his mills is still enjoyed, subject to occasional diminution from the exercise of the superior right of the sovereign. His interest in the water may be said to resemble a right of common, which, by custom, is subservient to the right of the lord of the soil; so that the lord may dig clay pits, or empower others to do so, without leaving sufficient herbage on the common, (*Bateson vs. Green*, 5 T. R. 411.)

Nor can the plaintiff claim by prescription against the public for more than the act confers on him, which is at best impunity for a nuisance. His license, or rather toleration, gives him a good title to keep up his dam, and use the waters of the river, as against every one but the sovereign, and those diverting them by public authority for public uses.

It is true that the plaintiffs' declaration in this case, alleges that the waters, diverted by defendants' dam and canal, are used for the purpose of mills, and for private emolument. But as it is not alleged or pretended that defendants have taken more water than

was necessary for the canal, or have constructed a canal of greater dimensions than they were authorized and obliged by the charter to make, this secondary use must be considered as merely incidental to the main object of their charter. We do not, therefore, consider the question before us, whether the plaintiff might not recover damages against an individual, or private corporation, diverting the water of this river to their injury, for the purpose of private emolument only, with or without license or authority of either of its sovereign owners. The case before us requires us only to decide that, by the laws of Pennsylvania, the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public; that riparian owners of land have no title to the river, or any right to divert its waters, unless by license from the State. That such license is revocable, and in subjection to the superior right of the State to divert the water for public improvements.

It follows necessarily from these conclusions, that whether the State of Pennsylvania claim the whole river, or acknowledge the State of New Jersey as tenant in common, and possessing equal rights with herself, and whether either State, without consent of the other, has, or has not, a right to divert the stream, it will not alter or enlarge the plaintiff's rights. Being a mere tenant at sufferance to both, as regards the usufruct of the water, he is not in a condition to question the relative rights of his superiors. If Pennsylvania chooses to acquiesce in this partition of the waters for great public improvements, or is estopped to complain by her own acts, the plaintiff cannot complain, or call upon this Court to decide questions between the two States, which neither of them sees fit to raise. By the law of his own State the plaintiff has no remedy against a corporation authorized to take the whole river for the purpose of canals, or improving the navigation; and his tenure and rights are the same as regards both the States.

With these views, it will be unnecessary to inquire whether the compact of 1783, between Pennsylvania and New Jersey, operated as a revocation of the license or toleration implied from the proviso of the colonial acts of 1771, as that question can arise only in case the plaintiff's dam be indicted as a public nuisance.

Nor is it necessary to pass any opinion on the question of the respective rights of either of these co-terminous States, to whom this river belongs, to divert its waters, without the consent of the other.

The question raised is not without its difficulties; but, being bound to resolve it by the peculiar laws of Pennsylvania, as interpreted by her own Courts, we cannot say that the Court below has erred in its exposition of them; and, therefore, affirm the judgment.

In the Supreme Court of the United States, February, 1853.

ASPDEN *vs.* ASPDEN.

The Supreme Court will not order the reargument of a case once decided, on motion of Counsel, but only where some one of the majority of the Court expresses a doubt and desires a reargument. It makes no difference that the decision of affirmance was by a divided Court.

This case went up on appeal from the Circuit Court for the Eastern District of Pennsylvania, was argued in May 1851, and held under advisement during the following vacation. On the 14th of December, 1852, the decree of the Circuit Court was affirmed, but the Supreme Court declined giving any opinion, at length, upon the points involved, as the affirmance was the result of an equal division of the Judges. The next day after this decree, a special order of the Court was made, directing a mandate to issue to the Circuit Court, certifying the affirmance of its decree by the Supreme Court.

Under these circumstances, a printed petition was filed on the 25th of February, 1853, by *Messrs. Wm. B. Reed, Thos. A. Budd, H. J. Williams, J. Randall, and Wm. Rawle*, asking a rehearing upon behalf of a portion of the former appellants, being the English claimants *a parte paterna*.

The petition after setting forth the facts, argued¹ that the prayer was justified by the uniform practice of the High Court of Chan-

¹ The Court did not listen to arguments, and the following points and authorities are reported from briefs prepared on both sides, and which would have been used had the Court consented to hear argument on the motion. It is thought that they may be useful to the profession.—*Eds.*